United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/930
15 November 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 930

Case No. 1002: KHAWAJA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Mr. Julio Barboza, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas, on 13 August and 13 December 1997, Sarfraz Hussain Khawaja, a former staff member of United Nations Children's Fund (hereinafter referred to as "UNICEF" or "the Agency"), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 24 January 1998, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to order:

"(i) [Rescission of the] decision not to give me the permanent appointment after the completion of four years on October 30, 1994.

(ii) Reinstatement of the Applicant to his post retroactively with full entitlement including salary."

Whereas the Respondent filed his answer on 25 March 1999;

Whereas the Applicant filed written observations on 15 June 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 1 November 1990, on a two-year fixed-term appointment, as Planning and Evaluation Officer, at the NO-C level, in Islamabad, Pakistan. On 1 November 1992, his appointment was extended for two more years. On 10 April 1994, the Applicant was assigned to the post of Programme Officer, Education. On 1 November 1994, his appointment was extended for one month, and he separated from service on 30 November 1994.

On 14 October 1990, the UNICEF Representative, Country Office Islamabad, wrote to the Applicant, who then held a government post in the Academy of Education Planning and Management (AEPAM), Ministry of Education, Government of Pakistan, and offered him a two-year fixed-term appointment post with UNICEF as Planning and Evaluation Officer. The UNICEF Representative requested the Applicant to submit to UNICEF a "Letter of Secondment" from his employer.

On 28 October 1990, the Applicant accepted UNICEF's offer and transmitted a letter from AEPAM indicating that the Applicant was being granted "two years leave extraordinary" to join UNICEF. On 1 November 1990, the Applicant signed a letter of appointment for a 24-month period.

On 15 September 1992, UNICEF approved an extension of the Applicant's appointment for a further period of two years. On 22 October 1992, AEPAM issued an order granting the Applicant leave for a further period of two years, from 1 November 1992 to 31 October 1994, and the Applicant subsequently signed a letter of appointment for the period 1 November 1992 to 31 October 1994.

On 3 October 1994, the Senior Programme Planning Officer, UNICEF, Islamabad, recommended that the Applicant be granted a permanent appointment.

On 15 October 1994, the Applicant wrote to the Secretary, Ministry of Education, Government of Pakistan, and stated "I expect that UNICEF will renew my existing contract

for few more years" and requested official to "grant [him] Extra-Ordinary Leave for a period of five years with effect from November 1, 1994 ..." On 27 October 1994, AEPAM issued an "Office Order" to the Applicant, which was copied to the UNICEF Representative, informing the Applicant that his leave would expire on 31 October 1994 and directing him to report for duty at AEPAM on 1 November 1994. On 1 November 1994, the Applicant signed a letter of appointment for the period 1 November 1994 to 30 November 1994.

On 16 November 1994, the Appointment and Placement Committee (APC), UNICEF, Islamabad, discussed the recommendation for conversion of the Applicant's fixed-term appointment to permanent. The APC recommended that the Applicant be released from his service with UNICEF "in order to obey ... the request from the Pakistani Government that he should resume his duty with [AEPAM]" and that he return to service with the Ministry of Education.

On 28 November 1994, the UNICEF Representative informed the Applicant that he had approved the APC's recommendation. He stated that "non-renewal of [his] contract [was] in [his] own best interests as well as those of UNICEF" as he did not "foresee the possibility of [his] long-term association with UNICEF, and sincerely believe[d] that [his] future career possibilities [lay] with [his] continued government service." Finally, while noting that a fixed-term contract normally ends automatically, the UNICEF Representative informed the Applicant that he would be granted the equivalent of one month's salary in lieu of notice, along with any other payments to which he was entitled under the Staff Rules.

On 6 December 1994, the Director General, AEPAM, wrote to the Applicant, informing him that "the Ministry of Education will have no objection to giving you leave for a period of three years in case you are acceptable to UNICEF." Also on 6 December 1994, the Applicant wrote to the UNICEF Representative, transmitting a copy of the Director General's letter, and explaining that, in view of AEPAM's letter, he had not returned to his service with the Government of Pakistan and wished to continue service with UNICEF. On 14 December

1994, the UNICEF Representative informed the Applicant that the decision on non-renewal of his contract had "already been taken" and encouraged him to return to service with AEPAM.

On 16 December 1994, the Applicant wrote a letter to the Executive Director of UNICEF requesting administrative review of the decision not to renew his fixed term appointment. The Deputy Director, Human Resources Administration, replied on 31 January 1995 informing the Applicant that administrative review of the decision would be conducted and that if he did not receive a decision within two months, he could file an appeal with the Joint Appeals Board (JAB).

On 29 March 1995, the Applicant lodged an appeal with the JAB.

The JAB adopted its report on 23 April 1997. Its conclusions and recommendations read as follows:

> "***Conclusions and recommendations***
>
> 44. Based on the foregoing, the majority members of the Panel *agreed* that there was no evidence that the decision not to consider the recommendation for conversion of the Appellant's fixed-term appointment to permanent was based on either of the two documents referred to by the Appellant, which he claimed contained false information.
>
> 45. The Panel *unanimously agreed* that the Appellant was not on genuine secondment from the Government of Pakistan during the period of his service with UNICEF, Islamabad, and that in so far as the Respondent relied upon the Office Order of the Government of Pakistan directing the Appellant to report to government duty, the decision not to consider the recommendation for conversion of the Appellant's fixed-term appointment to permanent was tainted by extraneous factors.
>
> 46. The majority of the Panel *agreed* that the Appellant had a legitimate expectation that the recommendation for conversion of his fixed-term appointment to permanent would receive fair and full consideration by the appropriate promotion bodies, and the refusal of the APC, UNICEF, Islamabad, to accord the Appellant such consideration was a violation of his legitimate expectation.

47. The majority members of the Panel *recommend*, in view of the findings in paragraphs 40 and 43 *supra*, that the Appellant be compensated and paid the equivalent of three months of his net base salary, representing the period between his separation from UNICEF on 30 November 1994 and his return to government service with AEPAM on 31 January 1995.

48. The majority members of the Panel *decided* to make no further recommendation in support of the appeal."

One JAB member filed a dissenting opinion, which read, *inter alia*, as follows:

"...

2. I concur with the finding of the majority members of the Panel that the Appellant was not on genuine secondment from the Government of Pakistan during the period of his service with UNICEF, Islamabad, and that in so far as the Respondent relied upon the Office Order of the Government of Pakistan directing the Appellant to report to government duty following his second two-year appointment with UNICEF, the decision not to renew the Appellant's fixed-term appointment was tainted by extraneous factors.

3. I am of the view, however, that the Appellant had no legal expectancy of continued employment with the Organization; accordingly, he is not entitled to any compensation.

4. I am of the view, also, that as the offer of UNICEF to the Appellant was conditioned on his securing leave of absence from his employer, the Government of Pakistan, which condition was contained in the two previous offers made to him, and which he complied with, the Appellant was obliged to either obtain leave of absence from the Government of Pakistan, or resign his post as Director of AEPAM, before he could accept any offer of appointment from UNICEF. The Government of Pakistan having refused to grant the Appellant leave of absence beyond 31 October 1994 and the Appellant having not resigned his post as Director of AEPAM, the decision by the Respondent not to renew the fixed-term appointment of the Applicant was a proper exercise of the discretionary power of the Respondent regarding staff appointment."

On 21 July 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "...
>
> The Secretary-General has considered your case in the light of the Board's report. He has taken note of the Board's conclusion that there was no evidence that the decision not to consider the recommendation for conversion of your fixed-term appointment to permanent was based on either of the two documents referred to by you, which you claimed contained false information. He has taken note of the Board's conclusion that you were not on genuine secondment from the Government of Pakistan during the period of your service with UNICEF and that in so far as the Respondent relied upon the Office Order of the Government of Pakistan directing you to report to government duty, the decision not to consider the recommendation for conversion of your fixed-term appointment to permanent was tainted by extraneous factors. The Secretary-General has also taken note of the Board's conclusion that you had a legitimate expectation that the recommendation for conversion would receive full and fair consideration and that the refusal to accord you such consideration was a violation of this legitimate expectation; it is hereby pointed out, however, that you had no legal expectancy of continued employment with the Organization.
>
> Finally, the Secretary-General has noted the Board's recommendation that, in view of the findings, you be compensated an amount equivalent to three months of your net base salary, and has decided to accept this recommendation and to take no further action regarding your case.
>
> ..."

On 24 January 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was entitled to a conversion to a permanent appointment based on his good performance over four years and the recommendation of his supervisor. The

APC acted unfairly by not recommending the conversion of the Applicant's appointment, and the Respondent relied on false and prejudicial information in deciding not to grant the Applicant a permanent appointment.

2. The Applicant's contract should have been renewed, as he was not on secondment status from his government, as the Respondent claims.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right under his fixed-term appointment nor the legal expectancy of continued employment with UNICEF.

2. The Respondent's award of monetary compensation in this case was a proper remedy and fully consistent with the Tribunal's jurisprudence.

The Tribunal, having deliberated in Geneva on 9 July 1999, and from 29 October to 15 November 1999 in New York, now pronounces the following judgement:

I. The Applicant's case is based on the determination by the JAB that "the decision [of the Respondent] not to consider the recommendation for conversion of the Appellant's fixed-term appointment to permanent was tainted by extraneous factors", i.e. the Respondent's reliance upon the "Office Order of the Government of Pakistan directing the Appellant to report to government duty". Consequently, the Applicant alleges that his "legitimate expectation that the recommendation for conversion of his fixed-term appointment to permanent would receive full and careful consideration by the appropriate appointment and promotion body(ies)" was not satisfied.

II. In other words, the Applicant alleges that due to its belief that there existed among

the three parties concerned (the Agency, the Government of Pakistan and the Applicant) a secondment contract, the APC, in 1994, felt barred from considering the substance of the request for conversion to a permanent appointment.

III. The Tribunal does not believe that this was the case. In any event, the situation was as follows: at the end of his second fixed-term contract, the Chief Operations Section, UNICEF, Islamabad, recommended that the Applicant should be granted a permanent appointment. Staff rule 104.12, on which the Applicant appears to rely in his pleas, does not give him the right to be considered for a permanent appointment before five complete years of service have elapsed. In other words, at the end of his second fixed term contract, i.e. by 1 November 1994, he did not have a right to the "full and careful consideration" of his request that he seeks, since he obviously had not yet completed the period of service required by staff rule 104.12 (b) (iii). Actually, at the time of the Applicant's first appointment in 1990, the APC rejected another candidate who "was disqualified ... [for] not having completed five years at his present post, although this criterion can be waived in exceptional circumstances which [that candidate] did not meet at this stage."

Since the recommendation that the Applicant receive a permanent appointment was made prior to his having served five years, the APC, in 1994, had only to consider whether or not the Applicant should be appointed to a new fixed-term contract and they decided against that possibility. The Applicant did not have any right to expect a new fixed-term appointment after the expiration of his second term. That is well established. Staff rule 104.12 (b) (ii) states that "[t]he fixed-term appointment does not carry any expectancy of renewal or conversion to any other type of appointment". Staff rule 109.7 states that "[a] temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment". (Cf. Judgements No. 440, *Shankar* (1989); No. 647, *Pereyra* (1991); and No. 795, *El-Sharkawi* (1996)).

IV. The Tribunal is satisfied that these arguments would be sufficient to reject the application entirely. However, even though the APC did not have an obligation to do so, there is a clear indication that it did in fact give "full and careful consideration" to the continuation of the Applicant's service. Its report states that "[it] reviewed the extensive documentation presented. After the discussions, there had been a wide consensus on the release of [the Applicant] from his service with UNICEF in order to obey with [sic] the request from the Pakistani Government, that he should resume his duty with the Academy of Education, Planning and Management as of 1st November, 1994".

V. The JAB interpreted this statement by the APC to mean that the APC had erroneously considered that, due to a presumed contract of secondment that was not even mentioned in the cited paragraph, the APC was barred from the possibility of even considering the Applicant for a permanent position. Based on this belief, the JAB proceeded to conclude that, since there was actually no formal secondment, full and careful consideration had not in fact been given to the Applicant with a view to a permanent appointment.

VI. This conclusion by the JAB was erroneous. The APC examined extensive documentation submitted and held discussions on the matter of the Applicant's situation, after which they agreed that the Applicant should return to his former post with the Government of Pakistan. This, of course, implies that the APC did not support the recommendation that he receive a permanent appointment. This recommendation by the APC need not to have been based on a formal contract of secondment, irrespective of how close to a secondment the arrangement between the three concerned parties was. The Tribunal is satisfied that the APC simply wanted to respect the wishes of the Government of Pakistan, in view of the understanding reached by the three parties.

VII. The Applicant was a Director in AEPAM. This institution had indicated it wanted the return of the Applicant's services. Whether or not the communications exchanged and the understanding reached among UNICEF, AEPAM and the Applicant constituted a formal contract of secondment is not the issue. The APC was authorized to find that there was an understanding with the Government of Pakistan which UNICEF ought to respect. Staff rule 104.12 (b) (iii) states in its final sentence that "a staff member ... will be given every reasonable consideration for a permanent appointment, *taking into account all the interests of the Organization*" (emphasis added). That is to say that among the necessary considerations within the "every reasonable consideration" to be granted to staff members seeking permanent appointments are "*all the interests of the Organization*". Naturally prominent amongst these would be that of respecting the understanding established with the Government of Pakistan to the effect that the Applicant would return to his service for that government.

VIII. The Tribunal is of the opinion that such an understanding was clearly established. In the APC minute of 6 September 1990, there is added an unsigned a note in long hand saying: "please arrange for the secondment of [the Applicant] for the ... period of two years from the Government. If [the Applicant] is not available, I would like to interview [another candidate] before offering an appointment".

The Applicant, in accepting UNICEF's offer by his letter of 28 October 1990, submitted what he called, "the letter of secondment from [his] employer". It is clear from that letter that (a) the Applicant had been authorized to apply for the UNICEF position, and (b) that the Federal Education Secretary of the Government of Pakistan had allowed him "two years leave extraordinary" to join UNICEF in the position of Planning and Evaluation Officer. So, there seems to have been an understanding among the three parties concerned, to the effect that after two years, the Applicant was expected to return to service with the Government of Pakistan in AEPAM. That period was extended at its expiration for a further

two years, subject to the same conditions, until finally the Applicant's request for five more years of leave from AEPAM was denied. That last decision was copied to the UNICEF Representative, obviously to let him know of the position of the Government of Pakistan. It was proper for the Administration to take the position that it would respect the understanding with the Government of Pakistan.

IX. The Tribunal finds that the Respondent did not take into account extraneous considerations in refusing to keep the Applicant in his employment nor did he otherwise treat the Applicant unfairly.

X. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Julio BARBOZA
Second Vice-President

Chittharanjan Felix AMERASINGHE
Member

New York, 15 November 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/931
15 November 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 931

Case No. 1021: SHAMSI & ABBOUD

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Issa Suleiman Shamsi and Mohammad Misbah Fadel Abboud, former staff members of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, successively extended until 30 November 1997, 28 February and 30 June 1998 the time-limit for the filing of an application to the Tribunal;

Whereas, on 12 May 1998, the Applicants filed an application requesting the Tribunal to order:

"i. Rescinding decision of termination of [Applicant] ABBOUD (...).

ii. Resinstating Applicant ABBOUD ... to duty effective the date of his suspension and considering The period of cessation, as special leave with full pay plus due interest.

iii. Should Respondent refrain from reinstating Applicant, Tribunal is prayed to compensate him for his salaries and separation benefits due until judgement has been ordered, plus a compensation for the severe injury cause to Applicant, to be paid in US dollars at the rate available to UN at the time of their separation.

iv. Payment of compensation to Applicant ... (SHAMSI) estimated at US$ 8,000 for injury sustained due to arbitrary termination Respondent reversed when he reinstated him. Equally interest on salaries paid for the period of cessation, are prayed to be ordered.

v. Payment of counseling fees and secretarial expenses estimated at US $ 1,000."

Whereas the Respondent filed his answer on 29 October 1998;

Whereas, on 3 March 1999, the Applicants filed written observations and Counsel for Applicant Abboud advised the Tribunal of Applicant Abboud's death during the pendency of this case;

Whereas, on 3 August 1999, the Executive Secretary of the Tribunal requested the Applicant Abboud's widow to submit proof that she had succeeded to her late husband's rights and indicate whether she wanted to proceed with the case;

Whereas, on 4 September 1999, the Applicant Abboud's widow submitted a written decision from the Shariya Court Damascus, attesting the fact of the Applicant Abboud's death and that his estate vested in his widow, Adla Mohammed Suradi and six children mentioned by name. The Applicant Abboud's widow also submitted a letter maintaining the deceased's application before the Tribunal;

Whereas the facts in the case are as follows:

The Applicant Shamsi entered the service of UNRWA on 2 January 1985, on a temporary indefinite appointment as an Area staff member, as a Personnel Assistant in the Syrian Field Office, Damacus. Effective 1 September 1988, the Applicant was promoted to the post of Assistant Field Personnel Officer and on 1 March 1992, he was transferred to the post of Field Administrative Services Officer.

The Applicant Abboud entered the service of UNRWA on 15 April 1972, on a temporary indefinite appointment as an Area staff member, as a Driver in the Syrian Field Office. Effective 1 January 1980, the Applicant held the post of Storekeeper "A" at the Syria Field Office and effective 13 July 1993, he was transferred to the post of Camp Services Officer at Jaramana Camp, Damascus Area.

Following reports of irregularities in the Special Hardship Programme in Dera'a and a substantial shortage of flour following a distribution of rations in that city, on 25 April 1995, the Director of UNRWA Affairs, SAR, convened a Board of Inquiry (BOI) to examine the procedures for according Special Hardship status to Palestine refugees in Dera'a and the procedures of UNRWA's distribution system for Special Hardship Commodities.

On 21 May 1995, after hearing 70 hours of testimony, the BOI submitted a detailed report to the Director of UNRWA Affairs. The BOI found that the South Area was a picture of "*rampant and pervasive dishonesty and deviousness which reached across the entire spectrum of staff*" and that this was the perception of the Agency's operations held by refugees.

The BOI noted that there were close personal relationships between the Field Office staff and certain staff at the South Area, which could have then allowed for the irregularities to continue unnoticed. Further, it was alleged that Field Office staff members were aware of the misuse of Special Hardship rolls and the diversion of commodities.

. On 31 May 1995, the Director of UNRWA Affairs informed the Applicants Shamsi and Abboud that it had come to the Agency's attention that they might be guilty of misconduct or serious misconduct, in that it appeared they were involved in a scheme that allowed for misappropriation of Agency commodities destined for Special Hardship Cases. The Applicants were further advised that an investigation of the charges was being undertaken, and pending the outcome of the investigation they were each suspended from duty without pay, effective close of business that day.

On 4 June 1995, the Applicants Shamsi and Abboud wrote to the Director of UNRWA Affairs and requested the reversal of the decision to suspend them without pay. They also sought compensation and requested the Director of UNRWA Affairs to place a representative of the Syrian Ministry of Foreign Affairs on the BOI.

On 11 June 1995, the Director of UNRWA Affairs advised the Applicants Shamsi and Abboud that he had reviewed the circumstances of their cases, that he was of the opinion that the decision to suspend each of them from duty without pay was fully justified and properly implemented in accordance with Agency procedures, and that the decision would therefore be maintained. On 13 June 1995, the Applicant Abboud wrote to the Director of UNRWA Affairs and again requested that the decision to suspend him from duty without pay be reversed.

In July 1995, the BOI submitted to the Director of UNRWA Affairs Annex I to its report of 21 May 1995. The Annex considered the role of staff members at the Field Office (the Applicant Abboud's previous post was at the Field Office warehouse) against whom certain allegations had been made during the initial phase of the BOI's investigation. Parts Five and Six of the Annex concerned the Applicants Abboud and Shamsi, respectively.

The Applicant Shamsi

The BOI was of the opinion that the Applicant Shamsi had received stolen rations from the Registration Clerk of the South Area, had lied repeatedly to the BOI in an attempt to cover wrongdoing, had stolen Agency supplies (some of which he had sold to a library in Yarmouk Camp) and had not reported all private mileage arising from his use of an Agency vehicle. The BOI found that his conduct was "unbefitting his status as an UNRWA employee".

On 12 July 1995, the Officer-in-Charge (OIC) of UNRWA Affairs advised the Applicant Shamsi of the findings of the BOI and of his conclusion that the the Applicant's conduct was incompatible with his status as an UNRWA staff member. The OIC of

UNRWA Affairs had therefore decided to terminate the Applicant Shamsi's appointment in the interest of the Agency pursuant to Area staff regulation 9.1 and Area staff rule 109.1, effective close of business on that day.

On 29 July 1995, the Applicant Shamsi wrote to the Director of UNRWA Affairs and challenged the basis for the termination of his services and sought reversal of the decision. On 28 August 1995, the Director of UNRWA Affairs advised the Applicant Shamsi that he had reviewed the decision to terminate his services and saw no reason to change that decision.

On 31 August 1995, the Applicant Shamsi lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 16 January 1997. Its evaluation, judgement and recommendation read as follows:

"**III. EVALUATION AND JUDGEMENT**

17. In its deliberations, the Board examined all documents made available to it including the Appellant's personal file and came out with the following:

A. By reference to the Appellant's personal file that the Appellant has an outstanding record of performance all through his years of service. The Appellant has been rated by his direct supervisor, in the periodic report of a February 1995 as 'a very conscientious staff member'.

B. The Board of Inquiry interviewed the Appellant on two occasions the first on 8 May 1995, the second on 28 June 1995, the Board here notes that it was not possible to find any written authorization to expand the investigation of the Board of Inquiry to the Field Office Staff after it submitted its report on 21 May 1995.

On the contrary, the same Chairman and members of the Board of Inquiry were requested officially to form a Board of Inquiry to investigate the situation in Central Area, (DUA, SAR Strictly Confidential A/P/INQ of 1 June 1995).

C. The Board is of the opinion that questioning the Appellant on using an Agency vehicle as a user/driver is quite irrelevant to the case under investigation.

D. The Board also noted, that selling Agency's Supplies to a library in Yarmouk Camp, is based on speculation without any specified date, also the action was conducted in a police-like manner did not yield any evidence whatsoever. The Board here quotes the witness 'I went there and saw stationary *similar* to the stationary that UNRWA has' and 'I saw some typewriters *similar* to the ones the UNRWA has'. In the Board of Inquiry ... the following is stated 'Moreover, the former GSO, his first trip to the library; *observed a typewriter from a distance* which is the same typewriter used in the Agency'.

E. As for the guard's testimony the Board found it unacceptable noting that the guard (grade 01) signed this English testimony in Arabic.

F. The Board therefore resolved that, based on the evidence produced, there are so many doubts about the involvement of the Appellant in these incidents.

IV. RECOMMENDATION

In view of the foregoing, the Board unanimously makes its recommendation that the Appellant be given the benefit of the doubt and hence the Administration's decision to terminate the Appellant's services in the interest of the Agency under Area staff regulation 9.1 be reversed."

On 18 March 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant Shamsi and informed him, in part, as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. The Board was of the opinion that the Board of Inquiry had no authority to continue its investigation into Field Office staff after it had submitted its main report. The Board was also of the opinion that your use of an Agency vehicle was irrelevant to the Board of Inquiry's investigation. It also questioned the evidence concerning the allegations of pilfering. Accordingly, it recommended that the decision to terminate your appointment be reversed.

Contrary to the Board's statement, the Board of Inquiry had full authority to extend its investigation into the Field Office. While I do not agree with the Board's reasoning in relation to the issue of private mileage, I am of the opinion that there is nevertheless insufficient evidence of impropriety on your behalf on this issue. In relation to the allegations of pilfering, on balance I am inclined to accept the Joint

> Appeals Board's view of the unreliability of the evidence which it has identified. Although the Board didn't specifically address the Board of Inquiry's finding that you repeatedly lied to it, in view of the Joint Appeals Board's other findings, the instances of lying are limited and are not proved by express contradiction. Accordingly, I have decided to accept the recommendation of the Board and to uphold your appeal. You will be contacted shortly by the Field Administration in relation to the implementation of my decision.
>
> ..."

On 25 May 1997, the Field Administration Officer advised the Applicant Shamsi that since his previous post had been filled and since there was no vacant post at his personal grade (grade 13), the Applicant was offered re-instatement into the post of Administrative Officer in the Field Supply and Transport Department, grade 12, but with grade and salary protection at grade 13. On 1 June 1997, the Field Administration Officer met with the Applicant Shamsi, who delivered a letter dated 31 May 1997 in which he requested, *inter alia*, reinstatement into his previous post or a post at his personal grade. On 3 June 1997, the Field Administration Officer acknowledged receipt of the Applicant's letter dated 31 May 1997 and confirmed that the offer of reinstatement was made on the terms outlined in his letter of 25 May 1997.

On 26 November 1997, the Applicant Shamsi advised that he was unable to repay all of the separation benefits that he had received when his services were terminated and argued that he had no obligation to do so in any event. On 3 February 1998, the Field Administration Officer advised the Applicant Abboud that his reinstatement was exceptionally approved without the requirement that he refund the Provident Fund benefits received on separation. He advised, however, that other separation benefits would be recovered and that the Applicant's service computation date would be 1 June 1995 subsequently corrected to read 1 November 1984 by a letter of 2 March 1998.

On 19 April 1998, the Applicant Shamsi challenged the computation of the recovery of his separation benefits and sought interest on his salary for the period between the date of termination of his services and his reinstatement. On 12 May 1998, the Field Administration

Officer advised the Applicant that the calculations had been checked and found to be correct, and further that the Applicant Shamsi's claim for interest had been forwarded to UNRWA Headquarters in Gaza. On 8 September 1998, the Field Administration Officer advised that the Applicant's claim for interest had not been approved. The Applicant Shamsi separated from service on early voluntary retirement effective 9 December 1998.

The Applicant Abboud

The BOI found that the Applicant Abboud had offered bribes to other staff members to cancel a computer list and to secure the termination of his services on medical grounds, that he had tried to undermine and pervert basic Agency procedures and that his overall conduct was also "unbefitting of an UNRWA staff member". The BOI also found that the Applicant had been untruthful to it.

On 12 July 1995, the OIC of UNRWA Affairs advised the Applicant Abboud of the findings of the BOI and of his conclusion that the Applicant's conduct was incompatible with his status as an UNRWA staff member. The OIC of UNRWA Affairs informed the Applicant that the OIC had therefore decided to terminate the Applicant Abboud's appointment in the interest of the Agency pursuant to Area staff regulation 9.1 and Area staff rule 109.1, effective close of business on 12 July 1995.

On 16 July 1995, the Applicant Abboud opted to take early voluntary retirement in accordance with Area staff rule 109.2(11). On 26 July 1995, the OIC of UNRWA Affairs approved the Applicant's request for early voluntary retirement. He noted that it was the Administration's position that thereby there was no longer an administrative decision against which the Applicant could appeal.

On 6 August 1995, the Applicant Abboud wrote to the Director of UNRWA Affairs and requested reversal of the decision to terminate his appointment in the interest of the Agency. On 5 September 1995, the Director of UNRWA Affairs reaffirmed to the Applicant Abboud that due to his early voluntary retirement there was no administrative decision, but also advised that he had nevertheless reviewed the initial decision taken to terminate the

Applicant's services and saw no reason to change the decision, given the findings of fact of the BOI.

On 8 September 1995, the Applicant Abboud lodged an appeal with the JAB. The JAB adopted its report on 14 April 1997. Its evaluation, judgement and recommendation read as follows:

"III. EVALUATION AND JUDGEMENT

13. In its deliberations, the Board examined all documents cited before it, including the Appellant's personal file and came out with the following:

(a). By reference to the appeal, the Board noted the Appellant's contention that he was arbitrar[ily] terminated.

(b) By reference to the Administration's reply the Board noted the Administration's contention that the decision to terminate the Appellant's services in the interest of the Agency was made in the exercise of valid managerial discretion.

(c) By reference to the report of the Board of Inquiry submitted on 21 May 1995, the Board noted that the said report states: 'that the CSO has tried by his suggestions to other Agency officials to undermine and pervert basic Agency rules and procedures ... and did in fact receive rations'.

(d) The Board also noted that the Appellant requested early voluntary retirement in lieu of termination of appointment in the interest of the Agency which [raises] the question of why the Appellant did not appeal the termination instead of asking for early voluntary retirement?

(e) The Board here notes that the Administration's decision to terminate the Appellant's appointment in the interest of the Agency was utterly based on the findings of the report of the Board of Inquiry.

(f) The Board also noted, that the Appellant failed to produce counterproductive evidence.

(g) In this context, the Board is of the opinion that the Administration has dealt within the framework of standing rules and regulations governing disciplinary measures and termination of staff members and, accordingly, the

Board could not establish that the Administration's decision to terminate the Appellant's appointment was motivated by prejudice or any other extraneous factors.

IV. RECOMMENDATION

14. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Appellant may deem pertinent, the Board unanimously makes its recommendation to uphold the Administration's decision and that the case be dismissed."

On 29 April 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant Abboud and informed him as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. The Board was of the opinion that the decision to terminate your services was based on the findings of the Board of Inquiry. It noted further that you did not produce any evidence which rebutted the case against you. In the absence of any proof that the Administration's decision was motivated by prejudice or any other extraneous factors, the Board recommended that your appeal be dismissed.

I agree with the Board's conclusions and I therefore dismiss your appeal.

In accordance with Area staff rule 111.3(12), a copy of this letter and the Board's report will be sent to the local Staff Union from SAR, thirty days after receipt of this letter by you. Kindly inform the Administration within this period if you object to a copy being sent to the Staff Union."

On 12 May 1998, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicant Shamsi's principal contentions are:

1. The decision to suspend the Applicant Shamsi without pay violated his rights.

2. The decision to terminate his appointment was arbitrary and motivated by prejudice and other extraneous factors.

3. The fact the the Applicant Shamsi was reinstated to a post at a lower level than the one he had occupied before his termination damaged his reputation.

Whereas the Applicant Abboud's principal contentions are:

1. The findings of the BOI against the Applicant Abboud were based on insufficient evidence and therefore the termination of his appointment on the basis of those findings was unjustified.

2. The decision to suspend the Applicant Abboud without pay violated his rights.

3. The decision to terminate his appointment was arbitrary and motivated by prejudice and other extraneous factors.

Whereas the Respondent's principal contentions are:

1. The Applicant Shamsi's application is not receivable by the Tribunal under the provisions of Article 7, paragraph 2 of its Statute, because the Respondent had accepted the JAB's recommendation which was favourable to the Applicant. Further, the Applicant raises new issues that were never before the JAB and consequently are also not receivable by the Tribunal.

2. The Applicant Shamsi has neither suffered financial loss nor irreparable damage to his reputation as a result of the decisions taken by the Respondent.

3. The decision to terminate Applicant Abboud's services in the interest of the Agency must stand, because it was an appropriate exercise of managerial discretion.

3. The Applicant Abboud bears the onus of showing that the decision to terminate his appointment was procedurally defective or vitiated by any extraneous factors such as bias or prejudice. He has failed to show the existence of any defect which impugns the decision.

The Tribunal, having deliberated from 8 to 30 July 1999 in Geneva, and from 1 to 15 November 1999 in New York, now pronounces the following judgement:

I. The Applicants Shamsi and Abboud have filed a joint application. Because the two Applicants' cases arise from related facts and raise similar issues, the Tribunal orders joinder of the cases.

Issa Suleiman Shamsi

II. Insofar as the Statute of the Tribunal is concerned, article 7 thereof provides that, save for applications coming before it directly by agreement between the parties and without a prior hearing by a JAB, applications are not receivable unless the Secretary-General has:

> "(a) Rejected the recommendations;
> (b) Failed to take any action within the thirty days following the communciation of the opinion; or
> (c) Failed to carry out the recommendations within the thirty days following the communication of the opinion."

III. In this case while the findings of the BOI were adverse to the Applicant Shamsi and let to the termination of his appointment by the Respondent, the JAB recommended that the decision be reversed. The Respondent duly accepted and implemented the JAB's recommendation and re-employed the Applicant Shamsi by way of reinstatement, so that none of the criteria required for admissibility arising from that decision have been met insofar as the Applicant's claim is concerned.

IV. The Applicant was reinstated in a grade 12 post, while prior to his termination he had been employed in a grade 13 post. This is *nihil ad rem* to the question of receivability, as this occurred because there had been no grade 13 post available for him at the time of his reinstatement and he accepted the grade 12 post, with salary protection.

V. In relation to the claim arising from the Applicant's suspension, the Tribunal is satisfied that it was imposed lawfully and in accordance with the terms of Area staff rule 110.2. There was at the time of the decision to suspend the Applicant Shamsi sufficient

information before the Director of UNRWA Affairs, SAR, to warrant a finding that the allegations made against the Applicant Shamsi were prima facie well founded and justified his suspension. Insofar as the Applicant Shamsi alleges that the suspension was made on a finding that misconduct had been established, this argument is clearly misconceived and based on a misunderstanding of both fact and law. The Tribunal has already elaborated on this aspect in Judgement No. 926, *Al-Ansari*, and need not elaborate on its findings or analysis of the appropriate rule here.

VI. Insofar as the Applicant Shamsi's claim for compensation for injury sustained "due to arbitrary termination" is concerned, it must be pointed out that it might be argued that in the circumstances of the case and having regard to the terms of the Statute, the Tribunal has no jurisdiction. In essence what was before the JAB was the Applicant Shamsi's appeal against the administrative decision to terminate his appointment in the interest of the Agency, pursuant to Area staff regulation 9.1 and Area staff rule 109.1. In this regard the Applicant in effect succeeded. The Tribunal is not at all surprised to note that the JAB did not deal with this matter as a claim for compensation. Since the issue of compensation was not in any meaningful sense considered by the JAB, it is not open to the Tribunal to deal with this issue in any way other than to view it as a claim for damages for moral injury arising from the decisions made by the Administration in relation to the Applicant Shamsi's suspension, the decision to subject his conduct to the scrutiny and examination of a BOI and the original decision to terminate his appointment, which was reversed when reconsidered in the light of the findings and recommendations of the JAB.

VII. It can hardly be argued that an Administration is not entitled to examine perceived problems or alleged wrongdoings by means of a BOI or similar body. This should not expose it to claims for damages by all persons ultimately exonerated from allegations which were made against them. To suggest otherwise would be absurd and the consequences would be such as would make it impossible for the Organization to function or to protect its legitimate

interests.

VIII. In relation to the moral injury allegedly suffered by the Applicant Shamsi arising from his suspension, the Tribunal has already decided that this suspension was in accordance with the provisions of the relevant Area staff rule. Accordingly, the Applicant Shamsi could not recover compensation for moral injury unless he established that the suspension was motivated by malice or other improper motive or that it was arbitrary or discriminatory or that it breached his rights. While allegations of conspiracy, fabrication of charges and other allegations of prejudice have been made on behalf of the Applicant Shamsi in relation to many of the persons concerned with the proceedings and while this is yet another case alleging the existence and activities of an outside "politico professional Bureau" and other allegedly sinister bodies, the Tribunal can find no evidence to support these allegations and consequently they are rejected. It appears to the Tribunal that there is no evidence of improper motive or prejudice concerning the decision to suspend the Applicant Shamsi nor is there evidence that his rights were violated by such decision. Accordingly the Tribunal is satisfied that the Applicant Shamsi is not entitled to damages for moral injury arising from the decision.

IX. The Tribunal is of like opinion, in so far as the Applicant Shamsi claims compensation for moral injury arising from the deliberations of the BOI and the Respondent's decision to terminate his appointment in the interest of the Agency. The Tribunal is satisfied that there is no evidence that the Administration acted out of malice or prejudice or some other improper motive in its decision to establish the BOI or in the determination of its terms of reference. Quite obviously there were at the time a number of questions of serious and immediate concern to the Administration regarding the effectiveness and operation of the UNRWA programmes and it was right and proper to have established a BOI to investigate those questions.

X. The Tribunal finds no evidence to establish any bias or prejudice or other improper behaviour on the part of anyone concerned in the conduct of the BOI such as might make the Respondent liable to a claim by the Applicant Shamsi. As to the report of the BOI in so far as it concerned the Applicant Shamsi, while findings adverse to his interests were made and while those findings were injurious to his reputation, the Tribunal is satisfied that there is no evidence of improper motivation, bias, prejudice or consideration of any extraneous matters that would expose the Administration to a claim for moral injury. In the opinion of the Tribunal the same can be said of the Respondent's initial decision to terminate the Applicant Shamsi's appointment in the interest of the Agency. The Tribunal can find no evidence that the Respondent acted with motives of bias or prejudice or any other improper motive in arriving at that decision. The fact that the Respondent took a different view after reconsidering the matter in the light of the findings of the JAB is not and cannot be evidence that the decision was improper when first arrived at.

XI. In so far as the Applicant Shamsi claims interest on the monies withheld from him between the date of his suspension and the date of his reinstatement, the Tribunal is satisfied that this aspect of the claim is not receivable under the terms of the Statute. No application has been made to a JAB against the administrative decision of the Respondent not to pay such interest, nor has the issue been submitted to the Tribunal directly, without previous consideration by a JAB, by agreement of both parties.

XII. The Tribunal further observes that it is doubtful whether the Applicant Shamsi has in any event suffered a loss by virtue of his suspension and the Respondent's refusal to pay interest on the monies withheld between the date of his suspension and the date of his reinstatement. The Respondent decided to forego requiring the Applicant Shamsi to refund the Provident Fund Benefits (on the grounds that this would subject him to financial hardship) so it may well be that when credit has been given for the waiver of this obligation the Applicant Shamsi has suffered no actual loss.

Mohammad Misbah Fadel Abboud

XIII. The death of Applicant Abboud occurred on 12 December 1998, before the Tribunal could consider his application, which is now maintained by his widow, Adla Mohammed Suradi.

XIV. Adla Mohammed Suradi has submitted to the Tribunal a decision from the Shariya Court Damascus certifying that his estate vested in her and his six children mentioned by name. The Tribunal is satisfied that this decision entitles Adla Mohammed Suradi to maintain her late husband's application, in accordance with Article 2, paragraph 2 (a) of the Statute of the Tribunal.

XV. The BOI found that the Applicant Abboud had attempted to suborn the former Field Nutritionist to cancel the "Computer Data Control System for Pregnant and Nursing Mothers" and that he was untruthful to the BOI about staff members working in his apartment during and after working hours. The Tribunal is satisfied that the former finding should not be doubted or ignored merely because the BOI did not make a specific finding as to how such a cancellation might personally have benefitted the Applicant Abboud.

XVI. The Tribunal is satisfied that there was cogent evidence before the BOI which entitled it to make those findings adverse to the Applicant Abboud. It is further satisfied that there is no evidence that the BOI was motivated by malice or other improper motive or that there was any denial of fairness or due process. Thus, there is no reason for the Tribunal to set aside those findings. Nor is there a reason for the Tribunal to set aside the decision to terminate the Applicant Abboud's services "in the interest of the Agency" made in reliance on those findings.

XVII. What occurred thereafter complicates the situation. When the Respondent wrote to the Applicant Abboud on 12 July 1995, informing him of the decision to terminate his

appointment in the interest of the Agency, the Applicant Abboud replied by letter of 16 July 1995 indicating that "under the current Area Staff Rules I opt for early voluntary retirement benefits, without prejudice to my rights towards the disciplinary decision of termination."

XVIII. In his letter of 26 July, the Respondent approved, *inter alia*, the Applicant Abboud's request for early voluntary retirement but pointed out that the Administration's position was "that [his] request for early voluntary retirement whilst entitling you to increased separation benefit is not an administrative decision within the meaning of Area staff regulation 11.1 and is, therefore, not subject to appeal under the Area Staff Regulations". The Tribunal notes that the record includes a copy of that letter bearing an annotation dated 6 August 1995 by the Applicant Abboud, as follows: "Agreed because of the state of hardship and horror, without prejudice to my right of recourse against the disciplinary action of arbitrary termination."

XIX. Also on 6 August 1995, the Applicant Abboud wrote to the Director of UNRWA Affairs requesting reversal of the decision to terminate his appointment. The Respondent replied on 5 September 1995, as follows:

> "...
>
> In your letter, you have requested that the decision to terminate your appointment ..., be reversed. I would remind you that your request for early voluntary retirement was approved effective close of business on 12 July 1995, and therefore, ..., the notice of termination of your appointment in the interest of the Agency was considered withdrawn in accordance with the provisions of Area staff rule 109.2.
>
> Since you left the Agency's service at your request on early voluntary retirement and not under the provisions of Area staff regulation 9.1, there no longer exists an administrative decision which you may claim constitutes a non-observance of your terms of appointment. Nevertheless, I have reviewed the original decision to terminate your services and I see no reason to change that decision, given the findings of fact of the Board of Inquiry."

XX. Notwithstanding the correspondence referred to above, the Applicant Abboud appealed to the JAB. It appears to the Tribunal that the administrative decision being appealed was the Respondent's decision to terminate the Applicant's appointment in the interest of the Agency. The Tribunal notes the JAB focused its attention on this aspect rather than on the consequences of the correspondence already referred to and did not decline jurisdiction on the grounds that there was no administrative decision amenable to an appeal. The JAB did however note that the Applicant Abboud had requested early voluntary retirement in lieu of termination and observed that this raised the question of why he had not appealed the decision to terminate his appointment instead of asking for early voluntary retirement.

XXI. While complications arise from this correspondence, the Tribunal has concluded that the parties were never of the same mind as to the consequences which would arise on the issue of voluntary early retirement. The Applicant Abboud had sought this retirement on the condition that he could preserve his rights in relation to the decision to terminate his appointment. The Respondent had granted it on the basis that the early retirement extinguished the Applicant Abboud's right of appeal, and that he had withdrawn the decision. Each purported to act unilaterally, so that there was no binding agreement. Since the Applicant's offer to take early voluntary retirement was conditional, it was an offer which the Respondent could have accepted or rejected but was not entitled to accept on his own terms. The Tribunal is of the opinion that the issue as to the Respondent's decision to terminate the Applicant Abboud's appointment in the interest of the Agency is justiciable by the Tribunal rather than rendered moot on the basis that it was extinguished by the Applicant Abboud's early retirement, although the Respondent had purported to rescind the decision to terminate his appointment in the interest of the Agency.

XXII. The JAB, when dealing with the substantive appeal, found that the Administration had dealt within the framework of standing rules and regulations governing disciplinary

measures and the termination of staff members. It found that it could not establish that the decision was motivated by prejudice or other extraneous matter and recommended upholding the Administration's decision that the case be dismissed.

XXIII. The Tribunal is satisfied that there was cogent evidence before the BOI which justified the findings made against the Applicant Abboud, that the Respondent was entitled to accept those findings and to consider them as misconduct and to terminate the Applicant Abboud's appointment in the interest of the Agency. Likewise the Tribunal can find no evidence that either the BOI or the JAB failed to accord the Applicant Abboud fairness or due process or that either of them was influenced by malice or any improper motive. The findings made by the BOI adverse to the Applicant Abboud were serious ones and in the view of the Tribunal entitled the Respondent to terminate the Applicant Abboud's appointment.

XXIV. For the foregoing reasons, the Applicants' pleas are rejected in their entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

New York, 15 November 1999

Maritza STRUYVENBERG
Executive Secretary